KEITH S. RUSH

IBLA 78-112 Decided July 12, 1978

Appeal from the decision of the Butte, Montana, District Office of the Bureau of Land Management, refusing to renew a special land use permit because the land had been designated a primitive area. M-19825.

Reversed and remanded.

1. Regulations: Generally

> The regulations of this Department have the force and effect of law, and are binding upon the Secretary and those who exercise his delegated authority. Where land has been included in a designated primitive area in derogation of the criteria established by regulation, the designation must be canceled as to such land.

APPEARANCES: Keith S. Rush, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The land at issue here originally was covered by a dense stand of Douglas fir and lodgepole pine timber. In 1965, one Wayne W. Montgomery, Jr. acquired a special land use permit from the Bureau of Land Management, pursuant to which he proceeded to develop the subject land (and the adjacent private land) as a commercial ski area. On the subject land this development included the construction of a chalet-type building at the peak of the slope, with ski runs extending north and northeastward from the chalet. The ski runs were created by clearing wide areas through the trees and brush. He also cleared an access road leading up the chalet. BLM issued a right-of-way permit to the Vigilante Electric Power Cooperative, which constructed a power line on the land to furnish electricity to the chalet. The permit held by Montgomery authorized the construction of the access road, ski runs, "warming house," toboggan runs, a ski lift, and placement of a trailer house.

The ski lift was never built. Instead Montgomery transported skiers to the peak by use of large snowmobiles. Reports in the file suggest that Montgomery's ski operation was not a financial success, and that he also suffered financial losses in other unrelated ventures during this period.

In 1971 Montgomery sold out to Keith S. Rush for $75,000. It was apparently contemplated by the parties that Montgomery's special land use permit would be transferred to Rush. However, the Dillon District Office, BLM, advised Rush's lawyer that special land use permits are not transferable, and that Rush could acquire one in his own right by filing an application. Rush did so, and eventually, in 1973, he was issued a 5-year special land use permit covering the period from October 1, 1971 to September 31, 1976.

Rush incorporated the chalet and ski runs, trails, road, etc. on the permit land as an integral part of the commercial operation of his "Lakeview Ranch," situated on privately owned adjacent land. Lakeview Ranch includes a lodge, a cafe, several cabins, corrals, sheds and other buildings, and Rush operates a guest ranch and hunting guide service there, among other things. A county road crosses Rush's patented land and passes within one-quarter mile of the land in question. The chalet is 200 to 300 years from the patented land owned by Rush. The chalet is said to be a 40' x 40', two-story structure with a 360 degree porch, set on a 12-foot high cement foundation. The building is served by two septic tanks, a 1,000 gallon water tank (to which water is hauled), the power line, which cost the owner $4,300 to install, and by the access road. The ski runs and trails which originate at the chalet have their lower extensions on Rush's patented land.

The subject lands are in T. 14 S., R. 2 W., Principal meridian, Montana, and include Lots 1, 2, 3, SW 1/4 NE 1/4 and SE 1/4 NW 1/4 of section 26, comprising 228.07 acres.

On July 28, 1975, while the special land use permit was still in effect, the BLM State Director designated 24,165.70 acres of public land as the Centennial Mountain Primitive Area. Included in the designation were the subject lands. See 40 FR 32848 (Aug. 5, 1975).

In August 1976 Rush made application for a new special land use permit to replace the one which was about to expire. In reviewing this application BLM correctly noted that the enactment of the Federal Land Policy and Management Act 1/ had abolished BLM's authority to issue a special land use permit, but that Rush's application could be considered under section 302 of the new Act.

1/ 90 Stat. 2743, 43 U.S.C.A. § 1701 et seq.

However, the report of the BLM Realty Specialist noted that the parcel had been designated part of the primitive area and recommended that Rush's application be rejected, stating:

> Since Mr. Rush does own a building on the site placed there in accordance with a valid permit, it would be wrong to immediately inform him the building must be moved. At the same time, the land is part of a designated primitive area and has wilderness values so it is wrong to permit uses of the land which is inconsistent with the management criteria of primitive areas. Therefore, we must inform Mr. Rush to remove his building and close the area to off-road motor vehicle use or we must remove the lands from the designated primitive area. [Emphasis added.]
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> B. Rationale:
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> Whatever permit Mr. Rush had for the use of the lands expired on September 30, 1976. And, the formerly permitted area is a part of a designated primitive area. A renewal permit which would allow Mr. Rush to maintain the chalet on the area or which would allow motorized vehicles to use the area would be in violation of the objectives and criteria for use of primitive areas as given in 43 CFR 6221.0-2 and 6221.2. [Emphasis added.]

Based upon this report, BLM's Butte District Office issued a decision on November 10, 1977, rejecting the permit application. The decision also directed Rush to remove all structures from the land by September 30, 1978, failing which they would become United States property. From this decision Rush has appealed.

Appellant states that it would be impossible to relocate the chalet, and that the loss of the view which it commands and loss of the ski runs would have an extremely adverse affect on his operation. He asserts that the structure has been in continuous use as a winter and summer sports facility since 1965, and is used as a meeting place for church groups, scout and civic groups, a fishing school, Union College, and others. This assertion is supported by letters and petitions from previous users. Appellant also notes that if his continued use of this steep hillside is precluded, the recreational value of the land will be largely lost to the public, as the only reasonable access to the permit land is across his deeded land.

[1] We find that it was error to include the permit lands among those designated as part of the Centennial Mountains Primitive Area. The criteria for designating lands for inclusion in a primitive area are prescribed by regulation. 43 CFR 2071.1(b) provides, in pertinent part, as follows:

> The following types of areas and sites may be designated under the regulations in this subpart: (1) Recreation lands. * * * Recreation lands will contain one or more of * * * six classes * * *: (v) Class V -- Primitive areas: Extensive natural, wild, and undeveloped areas and settings essentially removed from the effects of civilization. Essential characteristics are that the natural environment has not been disturbed by commercial utilization and that the areas are without mechanized transportation. * * * [Emphasis added.]

Moreover, 43 CFR 6221.1 sets out the characteristics of primitive areas as follows:

> Characteristics. Natural, wild, and undeveloped lands in settings essentially removed from the effects of civilization are appropriate for designation as primitive areas. Essential characteristics are a natural environment that can be conserved and on which there is no undue disturbance by roads and commercial uses. Primitive areas may be representative of natural environments ranging from the southwest desert to the Arctic tundra. [Emphasis added.]

It is apparent that the land at issue meets none of the above criteria. It has been "developed" by the chalet, the power line, the access road, and the various runs and trails. The natural environment has been extensively disturbed by the clearing of the ski runs, trails and the road, which, according to appellant, involved the clearing of timber, brush, and stumps over a large portion of the entire tract. The effect of this disturbance of the natural environment for commercial utilization is readily apparent from the several photographs in the record. The designation of this land as a primitive area was made at a time when commercial utilization was actually in progress under the authority of a BLM special land use permit and had been so for nearly 10 years.

Administrative regulations have the force and effect of law. Morton v. Ruiz, 415 U.S. 199, 235 (1974); Service v. Dulles, 354 U.S. 363, 388 (1957); Associates v. City of Newark, 424 F. Supp. 984, 992 (1977). It has long been held that the Secretary and those

who exercise his delegated authority are bound by the regulations of this Department. Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 629 (1950); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); Arizona Public Service Co., 20 IBLA 120 (1975).

It is plain that when the lands at issue were designated as part of a primitive area, the criteria in the regulations, supra, were disregarded, and that had these criteria been applied the land would not have been so designated. Therefore, the designation is incorrect and must be removed. Appellant's application for a permit must then be adjudicated on its merits.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded to the Butte District Office, BLM, for further action consistent with this decision.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joseph W. Goss
Administrative Judge